

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
James D. Redd, M.D.,)	DATE: July 7, 1992
Petitioner,)	
- v. -)	Docket No. C-92-070
The Inspector General.)	Decision No. CR 213
)	

DECISION

By letter dated January 15, 1992, James D. Redd, M.D., the Petitioner herein, was notified by the Inspector General (I.G.), Department of Health & Human Services (HHS), that, pursuant to section 1128(a)(1) of the Social Security Act (the Act), he would be excluded for a period of five years from participation in the Medicare program and State health care programs as defined in section 1128(h) of the Act (referred to here as Medicaid). The reason given for this exclusion was Petitioner's conviction of a criminal offense related to the delivery of an item or service under Medicaid.

Petitioner filed a timely request for review of the I.G.'s action by an administrative law judge. The I.G. moved for summary disposition of the case. Inasmuch as there are no material facts in dispute, I conclude that there is no need for oral testimony or the confrontation of witnesses, and that summary disposition is appropriate. I further conclude that, under the facts of this case, a five-year exclusion is mandatory, and, accordingly, I enter summary disposition in favor of the I.G.

Applicable Law

Sections 1128(a)(1) and (c) of the Act (codified at 42 U.S.C. § 1320a-7 (a)(1) and (c) (1988) make it mandatory for any individual who has been convicted of a criminal offense related to the delivery of an item or service

under Medicare or Medicaid to be excluded from participation in such programs for a period of at least five years.

Section 1128(i) of the Act provides that an individual will be regarded as having been convicted when a judgment of conviction has been entered against him by a competent court (regardless of whether there is an appeal pending or whether the judgment is ultimately expunged); or when there has been a formal finding of guilt by a court; or when a court accepts a nolo or guilty plea; or when a court defers judgment to allow a guilty defendant who complies with certain conditions to preserve a clean record.

Argument

Petitioner contends that he was not convicted within the meaning of the statute inasmuch as there was no finding by the court that he was guilty, no sentencing, and his plea, although entered, was not accepted by the court, but was held in abeyance pending payment of restitution and costs. Subsequently, the plea was withdrawn and the charge dismissed.

Findings of Fact and Conclusions of Law¹

1. During the period relevant to this case, Petitioner was a licensed physician and Medicaid provider in the State of Utah.
2. On June 3, 1991, Petitioner pled guilty in the Third Circuit Court in and for Salt Lake County, State of Utah, to filing a false Medicaid claim, resulting in overpayment for services rendered. I.G. Ex. 3, 5.
3. Petitioner and the Utah Attorney General entered into a Plea Agreement whereby Petitioner would pay restitution, costs, and a penalty, totalling \$12,000. I.G. Ex. 4.
4. The parties agreed that as long as Petitioner complied with the Plea Agreement, they would recommend

¹The I.G. and Petitioner submitted documentary exhibits and briefs. I admitted all the exhibits into evidence and refer to them here as "I.G. Ex. ..." or "P. Ex. ..."

that the court hold his guilty plea and sentencing in abeyance. I.G. Ex. 4.

5. The court accepted Petitioner's guilty plea.

6. On February 6, 1992, following the payment by Petitioner of restitution, costs, and penalty, as required by the Plea Agreement, he was permitted by the court to withdraw his guilty plea and the charge against him was dismissed. I.G. Ex. 8,9.

7. The Secretary of Health and Human Services has delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

8. By letter dated January 15, 1992, Petitioner was notified by the I.G. that he would be excluded for five years from participation in the Medicare and Medicaid programs, based upon his conviction of a criminal offense related to the delivery of an item or service under Medicaid. I.G. Ex. 1.

9. Petitioner was "convicted" within the meaning of sections 1128 (i)(3) and (4) of the Act.

10. A criminal conviction for submitting a fraudulent bill to Medicaid is sufficiently related to the delivery of an item or service under Medicare or Medicaid to justify application of the mandatory exclusion provisions of section 1128(a)(1).

Discussion

The section of the Act under which the I.G. seeks Petitioner's exclusion, 1128(a)(1), contains two requirements. It requires that an individual (1) be convicted of a criminal offense, and (2) that such conviction be related to the delivery of an item or service under Medicare or Medicaid.

As to the requirement that Petitioner have been convicted, the relevant statute, cited above, indicates that there are essentially four sets of actions a court could take which would be regarded as a conviction -- i.e., the court could enter a judgment of conviction (it is immaterial whether there is an appeal pending or whether the judgment is ultimately expunged); or the court could make a formal finding of guilt; or the court could accept a guilty or nolo plea; or the court could defer judgment to allow a guilty defendant (who complies

with certain conditions) to preserve a clean record. As we have seen, Petitioner contends that the Utah court did none of these things in his case.

In this regard, the evidence of record does not show that there was a formal finding of guilt or judgment of conviction. However, I find that a preponderance of the evidence establishes that the court "accepted" Petitioner's guilty plea, and further find that the fourth alternative for establishing conviction -- the arranged deferral or withholding of judgment -- also has been met.

Petitioner submitted to the Utah court a document described as a waiver (I.G. Ex. 5) in which he pleads guilty to filing a false Medicaid claim. This document was not signed by the judge, even though it contained a place for him to affix his signature to indicate that the plea was accepted. Also, the I.G. did not offer proof that the court had declared its acceptance verbally. However, the absence of an explicit acceptance by the court does not mean that Petitioner's plea was not accepted, particularly where the totality of the facts and circumstances indicates otherwise. Petitioner addressed his plea to the court; he entered into an agreement with the prosecutor, an officer of the court, to recommend that the court hold in abeyance any action on Petitioner's case; and, when restitution had been made, the withdrawal of the charges and the plea was made with the court's explicit permission. I find that the inference to be drawn from the court's overseeing and approving of this entire process, from entry of the plea through final disposition of the charges, is that there was an acceptance of Petitioner's plea, in the context of a deferred adjudication arrangement, thereby satisfying sections 1128 (i)(3) and (4) of the Act.

I recognize that at least one United States court has refused, in part, to sustain a similar decision by an administrative law judge of the DAB regarding acceptance of a guilty plea. Michael Travers, M.D., v. Louis Sullivan, No. CS-91-232-JLQ (E.D. Wash. 1992) (Travers). In Travers, however, the State court whose action on the plea was in question not only had not formally "accepted" it, but also stated that it was taking the plea under advisement, and that plea acceptance would require a further petition by the parties. Thus, I find that the facts of the present case differ from Travers and are sufficient to support the inferences and conclusion drawn.

The evidence shows that the agreement between Petitioner and the prosecutor which caused Petitioner to plead guilty and ultimately led to his making restitution and the dismissal of the charges was not solely a bargain involving only the prosecutor and a defendant. The court involved itself early in the process to impose the restitution and later entered the case again to ascertain that the court-imposed conditions had been met and to ratify the dismissal/withdrawal of the charges. This is indicative not only of the court's pervasive involvement and acceptance of the plea and process, as noted above, but also shows that there was a well-established deferred adjudication arrangement in the jurisdiction in question, which the court and parties all expected to utilize. (Other decisions that are a matter of public record, such as the Travers case, reveal that the procedure by which Petitioner avoided a formal judgment is apparently quite common in Utah).

This holding and interpretation of the law are in accord with the intent of Congress with regard to section 1128. In H.R. Rep. No. 727, 99th Cong., 2d Sess. 75, 1986 U.S.C.C.A.N. 3607, 3665, the committee that drafted section 1128 declared that persons who defraud Medicare or Medicaid should not escape exclusion simply because their criminal cases are handled under first offender or deferred adjudication programs, whereby a defendant pleads guilty but no actual judgment of conviction is entered against him, provided he maintains good behavior and satisfies any other conditions that may be imposed. As noted in a prior decision by a judge of this office, "Congress intended the definition of conviction in section 1128(i) to include all circumstances where a party pleaded guilty to an offense, except where a conviction is vacated on appeal." Gordon Lee Hanks, R.Ph., DAB CR44 (1989).

As to the requirement that the conviction be related to the delivery of an item or service under Medicare or Medicaid, it has already been held that submitting fraudulent Medicaid claims constitutes a program-related offense which justifies mandatory exclusion. Russell E. Baisley, et al., CR128 (1991), and Marie Chappell, CR109 (1990).

Thus, I find that Petitioner was convicted of an offense related to the delivery of items under Medicaid, and that, as a consequence, the mandatory provisions of Section 1128(a)(1) require his exclusion for a minimum of five years.

Conclusion

Petitioner's conviction mandates a five-year exclusion pursuant to section 1128(a)(1) of the Act.

/s/

Joseph K. Riotto
Administrative Law Judge